

Collective bargaining and self-employed workers

The need for a paradigm shift

Silvia Rainone and Nicola Countouris

Silvia Rainone

is a researcher at the European Trade Union Institute (ETUI), Brussels and affiliated with KU Leuven.

Nicola Countouris

is the Director of the ETUI Research Department in Brussels and professor of labour law and European law at the faculty of laws, University College London.

Policy considerations

- EU competition law imposes limits on the scope of collective labour law, as it precludes self-employed workers from collective bargaining.
- There is a rising number of self-employed workers whose livelihood are characterised by increasing precariousness and whose working conditions could be improved by ensuring that collective agreements fall outside the scope of competition law.
- The European Commission intends to reform the scope of EU competition law and this could offer an opportunity to define a new regulatory paradigm.
- This policy briefs discusses a possible reconfiguration of the coexistence between collective bargaining and competition law.
- Access to collective bargaining should ensure that employing businesses with a dominant bargaining position do not push labour conditions downwards.

Introduction

The European Commission (hereafter Commission) has recently embarked into a process seeking to redefine the scope of competition law in order to reduce the chilling effect that certain judgments by the Court of Justice, and their often misguided application by national competition authorities, have had on collective bargaining. To date, the Commission has opened a series of consultations in the form of an inception impact assessment and of a public consultation to obtain feedback on different policy proposals ostensibly aimed at enabling ‘an improvement of working conditions through collective bargaining agreements – not only for employees, but also, under some circumstances, for the solo self-employed’ (‘Collective bargaining agreements for self-employed – scope of application EU competition rules’, Ref. Ares(2021)102652 - 06/01/2021).

This regulatory initiative creates a momentum for rethinking and expanding the role of collective labour rights in the changing world of work and prompts a reflection on the adequacy of the current legal framework with regard to the scope of application of labour law. It is, in particular, worth asking whether labour rights can continue to be dependent on normatively predetermined legal categories, such as those of self-employed, employee, workers or other intermediate categories, and how these categories interplay with other regulatory domains, including with EU competition law.

This policy brief attempts to define an alternative normative paradigm to reconsider the scope of collective labour law in relation to the constraints imposed on it by EU competition law. Although it is certainly possible to extend the reflection on this paradigm shift to the entire body of workers’ rights, in this context the focus will only be on collective bargaining. It is indeed especially in relation to collective bargaining that the binary division between ‘worker’ and ‘self-employed’ seems most artificial and detached from the actual rationale of labour law, not to mention that precluding access to collective bargaining on the basis of contractual status is contrary to various instruments of international law (ILO Convention 87, 98 and European Convention of Social Rights, Article 6 among others). It is also worth recalling (as also noted by ETUC 2021) that making the validity of collective agreements signed by the parties subject to the approval of national competition authorities clashes with some core principles of collective bargaining, as protected by Convention No. 98. On the basis of these important elements, this policy brief elaborates further on the criteria that could be used to clarify the respective scopes of labour law and competition law.

The effects of the prohibition of collective bargaining for the self-employed

EU competition law, and in particular Article 101(1) TFEU, prohibits anticompetitive agreements between undertakings, including price-fixing agreements (Biasi 2018; Doherty and Franca 2020). Since an ‘undertaking’ is broadly defined as any entity engaged in an economic activity and since exceptions are admitted only for agreements regulating the working conditions of those who are in

an employment relationship, EU competition law has emerged as a barrier excluding the self-employed from the rights and protections enshrined in collective agreements.

This prohibition raises more than just doctrinal questions. Disenfranchising self-employed workers from the right to collective bargaining means accepting that their precarious negotiating position will almost invariably result in degrading working conditions. This becomes clear when looking at the union activity regarding self-employed and non-standard workers (Vandaele 2018). In most EU countries, unions cover self-employed among their members, organize and represent them. Especially in the sectors of journalism, translation, entertainment, the arts, and transport, a number of collective agreements have been signed which also apply to the self-employed, potentially entering on a collision course with EU competition law (Fulton 2018).

The responses to the Commission's inception impact assessment also provide a clear picture of how the risk of being subject to unfair working conditions increasingly transcends the binary divide between employment and self-employment. The respondents, mostly trade unions or the self-employed themselves, identify a number of challenges, including the following two. The first is that of the contractually dominant position of their contractors, who are often 'market leaders', agencies or intermediaries. These businesses generally offer very low rates and thus provoke downward competition among self-employed professionals, whose working standards and remuneration deteriorate more and more. The trend is to 'work more for less'. A second problem is that some of the intermediaries themselves are often subject to the monopsonic power of their clients or, even when that is not technically the case, they anyway try to win bids by offering the cheapest price. This adds pressure on the labour costs of the personnel who will then be assigned to carry out the service, especially if that personnel is also composed of self-employed contractors.

So far, the Court of Justice of the European Union (hereinafter CJEU) has attempted to resolve the issue of the compatibility between competition law and collective bargaining by attributing a rather broad notion to the concept of EU worker, while excluding the self-employed. Most notably, in the *FNV Kunsten* case (C 413/13) the CJEU ruled that a self-employed worker is not an undertaking, if she cannot independently define her own conduct on the market, if she is entirely dependent on the other contractor, if she does not share the business risk, or if she operates as an auxiliary within the principal undertaking.

More recently, in the *Yodel* order (C 692/19), the CJEU further clarified the EU concept of 'worker', suggesting to look at whether the work is carried out personally or whether there is the option to recruit one's own staff, whether there is the possibility to choose tasks to be performed and the manner in which they are to be performed, and whether there is discretion in determining the time and place of work (Aloisi 2020). Although this decision concerned a different legal issue, namely the application of the Working Time Directive, and in spite of the unfortunate emphasis on a narrow concept of 'personality' in work (that could result in the addition of 'substitution clauses' to platform workers' contracts in order to defeat employment status claims), some of the broader criteria in the EU 'worker' definition could also be applied to redefine

the scope of competition law and ensure that the right to collective bargaining falls outside its scope.

Although useful for identifying the existence of an employment relationship, the indicators defined by the CJEU persist in framing the right to collective bargaining as the prerogative of employees and workers. They therefore do not offer a solution to the difficulties experienced by self-employed workers with respect to their working conditions.

A paradigm shift

Among all the possible solutions, this policy briefs proposes an approach that tries to realign the scope of both legal domains, competition law and collective bargaining, with their normative function.

Collective bargaining

From a historical perspective, the predominant normative function of collective bargaining has been to correct the uneven distribution of bargaining power between the parties of the labour relation (Davies and Freedland 1983). It indeed contributes to strengthening the contractual position of workers, ensuring that the working conditions do not uniquely reflect the interests and economic power of the dominant party, the employer. The minimum labour standards stipulated in collective agreements not only prevent the employer's profit from being extracted from lowering working conditions, but also put a brake on the tendency of businesses to compete on labour costs. Through collective bargaining, trade unions and businesses agree on a series of workers' prerogatives and thus create a level playing field with regard to labour costs which, in turn, ensures that a company's success does not depend on lowering working conditions.

Collective bargaining is therefore vital for the respect of the fundamental principle whereby 'labour is not a commodity'. This expression is not just a slogan but carries some normative implications. It means that labour shall not be subjected to the same market dynamics as commodities whereby, to put it simply, if supply is greater than demand, the price falls, and vice versa. In the labour market, it is therefore accepted that labour cost fluctuation should be limited in order to avoid a race to the bottom which, among other things, damages the fabric of society (Langille 1998).

Competition law

EU competition law aims at the preservation of consumer welfare by preventing anticompetitive practices and their distortive effects on the market. Article 101(1) TFEU thus forbids any agreements between undertakings, decisions by associations of undertakings and concerted practices that have the object or the effect of restricting competition. Collective agreements, like other horizontal agreements among companies, may have the effect of restricting competition in the internal market and are, if that's indeed the case, caught by the prohibition of Article 101(1) TFEU. Indeed, by means of collective agreements, businesses

commit to respect a set of labour standards, including minimum level of remuneration, which in turn imposes a floor to the price that will be paid by the consumer or client.

However, it is important to note that competition law cannot be exclusively conceived through a price-centric approach. It should also be oriented to pursuing the social objectives of the Union as set out in Article 3 TEU, including the development of Europe based on a social market economy and social progress (Holmes). This broader approach underpins the *Albany* judgment (C 67/96) where the CJEU ruled that collective agreements applying to workers in an employment relationship are, in effect, to be considered outside the scope of competition law. With this ruling, the CJEU essentially accepted that EU competition law should take a step back if the purpose of the agreements is to prevent businesses from competing on labour costs (Biasi 2018).

A new paradigm

The relationship between collective bargaining and competition law cannot therefore be defined in purely oppositional terms. Collective bargaining prevents businesses from entering into a spiral of downward competition on labour costs, and this rationale also underpins competition law, as the exception concerning collective agreements covering employees shows. The current inadequacy of the regulatory framework thus does not derive from an ontological contradiction between competition law and collective bargaining, but rather from the fact that the world of work has changed considerably since the CJEU delivered the *Albany* judgment.

Indeed, as already discussed, the downward pressure on working conditions is no longer only a risk for employees but concerns also the self-employed, thus making it fairly anachronistic that competition law permits collective bargaining only for employees. No reasonable normative justification can be found for not extending this exclusion to a broader range of circumstances since collective agreements are also intended to prevent competition between individual businesses from having a race to the bottom effect on labour costs.

It therefore seems that the distinction between ‘workers’ or ‘employees’, on the one hand, and ‘self-employed’, on the other, is not an adequate normative criterion to define the border between the scope of collective bargaining and that of competition law. What appears more relevant is to identify those circumstances in which the dominant bargaining position of one of the contracting parties has the effect of pushing labour costs downwards.

This would allow collective bargaining to address those situations in which the bargaining imbalance between the parties adversely affects the terms and conditions of work, regardless of the employment status of the labour provider. But not only that; it would also give collective bargaining the possibility to help correct those situations in which a company exercises monopsony power over the labour market, as it generally is the case, for instance, in the context of platform work (Countouris, De Stefano and Lianos 2021). This occurs where a limited number of companies are buyers of a given service, in this case labour supply, and have the power to force down the price for that ‘service’. Interestingly,

in counteracting the monopsony effect, collective bargaining would pursue an objective shared with competition law, which does not look favourably on these phenomena because of the negative effect on consumer welfare (TUAC 2019).

Ideally, the regulation should remove those normative obstacles that prevent collective bargaining from ensuring that the contractually dominant position results in a depressive effect on labour costs. And this is often the case when the service agreements are stipulated with individual businesses in monopsonistic markets. This is particularly the case when companies with monopsonic power on a certain segment of the labour market conclude service agreements with and exert pressure on individual businesses, which may also act as intermediaries with other businesses or with self-employed persons. A textbook example for this kind of situation would be an agreement concluded by small milk farmers (which in many rural communities can be solo self-employed or small family or family-run businesses, even if endowed with some capital assets, such as machinery and livestock) in order to concert a minimum price for the sale of milk to the large dairy product conglomerates or the large supermarkets that, due to their size and dominant position, typically operate as monopsonist buyers and can directly influence the price of milk while indirectly influencing the price of labour. Some unions have been active in organising this type of individual businesses in the agricultural sector (cf. for instance the EFFAT affiliated ALPA (CGIL), Terra Viva (CILS), and UILA-UIL).

A further relatable example stems from certain franchising arrangements that, as noted by Koukiadaki and Katsaroumpas rest ‘upon the paradoxical combination of legal independence and business fragmentation with strong economic integration and control by the franchisor’ (Koukiadaki and Katsaroumpas 2017). The authors correctly note that ‘Particularly in sectors where the labour costs amount to a significant percentage of the overall costs (as in fast-food industry), the inability of the franchisee to control all others factor (such as pricing policy, products purchased from the franchisor or from approved by the latter producers at specific prices, rents) makes labour costs one of the few, if not the only, variable to be adjusted for increasing the profit margins and profitability by the franchise’. If one adds to these considerations the fact that these industries tend to be dominated by a relatively small number of key players, and the essential factor that many of the franchisees are essentially individual businesses, then it becomes clearer that collective agreements between these players seeking to counter the downward pressure of the dominant bargaining position of the monopolistic firms on the contractor’s labour cost should also benefit from an exclusion from competition legislation. Think for instance of DPD franchisee Don Lane, who collapsed during a round of Christmas deliveries because his franchisor would not offer him any form of sick leave, expecting him instead to nominate a substitute when too unwell to work. There is little doubt that he would have benefitted from agreeing and collectively setting with other franchisees (and with the support and engagement of a trade union organisation) the essential terms and conditions of his franchising agreement with DPD without a competition authority declaring such agreement a cartel. It is worth noting that similar and complementary suggestions are currently being explored by trade union organisations (UNI Europa 2020; TUAC 2019).

From theory to practice

Having determined that competition law should not prevent collective bargaining from being accessible in all those situations where the dominant bargaining position of one of the contracting parties has the power to push down labour costs, we move on to identify a set of indicators that may assist with ensuring that these agreements fall outside the scope of competition law.

With no pretence of being exhaustive, it is suggested that the following criteria, which can also be applied separately and not necessarily cumulatively, could be considered.

Collective bargaining should be allowed (i.e. fall outside the scope of competition law) in case of any contractual relationship where a service is provided to a business and where such service:

- 1) Consists of **predominantly personal work**. This means that the objective of the service contract is a predominantly labour-intensive activity carried out by a self-employed person. As an example, one can think of the case of the freelance translator.
- 2) **Converges in the economic activity of the service receiver**. This refers to cases where the service performed is an integral part of the production process that enables the service receiver to conduct its business. The contractual relationship between a franchisee and a franchisor who is also a dominant market player is a significant example.
- 3) Is performed **for a business that offers the same service in the market** and which, therefore, could theoretically be considered a competitor of the party performing the service. Examples could be that of a small milk producer selling its milk to a large dairy product conglomerate.

In presence of one of these three situations, the service provider should have the right to collective bargaining.

Figure 1 Indicators to redefine the scope of collective bargaining

Indicators	
1	Predominantly personal work
2	Part of the economic activity of the service receiver
3	Service receiver offers the same type of service in the market

Source: authors' own elaboration.

Concluding remarks

This policy brief explored a possible normative paradigm for redefining (if not eliminating) the limits that competition law imposes on collective bargaining; a paradigm that should be preferred to that anchored to the formal contractual status of the workers (employee or worker on the one hand, and self-employed on the other hand).

The previous paragraphs attempted to redesign the rules of coexistence between collective bargaining and competition law and suggested that the service provider should be granted the right to collective bargaining whenever necessary to prevent the contracting party with the dominant bargaining position from exercising a compression of labour standards.

It is now possible to comment on the four possible policy solutions that the Commission has outlined in the context of its inception impact assessment. Option 1 consists of giving access to collective bargaining to all solo self-employed providing their own labour through digital labour platforms. Option 2 also extends this right to those solo self-employed providing their own labour to professional customers of a certain minimum size operating in the 'off-line economy'. Option 3 allows collective bargaining irrespective of the size of the professional client, except for regulated and liberal professions. Finally, option 4 allows collective bargaining also in the case of regulated and liberal professions, thus removing the limitation underpinning option 3.

Among these regulatory solutions, option 4 is the one granting collective bargaining a wider scope of application. However, it should be noted that even option 4 does not address all the situations in which the gap in bargaining power between the parties results in an excessive compression of working conditions and falls short of guaranteeing a full exclusion of collective bargaining from the scope of competition law. Option 4 in fact engages only the first of the three indicators set out in the previous section and does so in an unacceptably narrow way by referring to 'own labour' instead of the suggested broader criterion of 'predominantly own labour'. It thus seems to exclude the labour providers who are contractually authorised to appoint a 'substitute' to perform the contracted work task, thus failing to resolve the strict personality requirement underlying the *Yodel* decision, mentioned above.

The introduction of this new paradigm shift should be accompanied by two essential safeguards. The first is that, within this expanded normative framework, it should always be for the trade unions to bargain on behalf of their members and identify the situations where the monopsonistic market leads to intolerable downward pressures on labour. The second safeguard is a corollary of the first, being that the state (and, in particular, competition authorities) should not interfere and should accept the fruits of collective bargaining as falling outside the scope of competition law, as per the international obligations imposed by ILO Convention 98 (Countouris and De Stefano 2021).

The proposed paradigm shift is one of the potential avenues that can be taken to reinstate collective bargaining in its original normative function. It is to be hoped that the momentum created by the proposed reform of competition law will not be lost, but also that a serious reflection and institutional debate will be opened on the role that collective bargaining needs to play in the changing world of work.

References

- Aloisi A. (2020) Time is running out – The *Yodel* order and its implications for platform work in the EU, *Italian Labour Law e-Journal*, 13(2), 67-87. <https://doi.org/10.6092/issn.1561-8048/11777>
- BEUC (2020) BEUC supports European Commission's competition investigation into Amazon's e-commerce activities, Press release, 10 November 2020.
- Biasi M. (2018) 'We will all laugh at gilded butterflies'. The shadow of antitrust law on the collective negotiation of fair fees for self-employed workers, *European Labour Law Journal*, 9(4), 354-373.
- Countouris N., De Stefano V. (2021) The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively, *Bulletin of Comparative Labour Relations*, Vol. 109, 3 – 17.
- Countouris N., De Stefano V. and Lianos I. (2021) The EU, competition and workers' rights, Research Paper, 2021.2, London, Centre for Law, Economics and Society (CLES).
- Davies P. and Freedland M. (1983) *Kahn-Freund's labour and the law*, 3rd ed., Stevens.
- Doherty M., Franca V. (2020) Solving the 'Gig-saw'? Collective rights and platform work, *Industrial Law Journal*, 49(3), 352-376.
- ETUC (2021) ETUC Resolution for a More Sustainable and Inclusive Competition Policy. <https://www.etuc.org/en/document/etuc-resolution-more-sustainable-and-inclusive-competition-policy>
- European Commission (2020) Statement by Executive Vice-President Vestager on Statement of Objections to Amazon for the use of non-public independent seller data and second investigation into its e-commerce business practices, 10 November 2020.
- Fulton L. (2018) Trade unions protecting self-employed workers, Brussels, ETUC.
- Holmes S. (2020) Climate change, sustainability and competition law, *Journal of Antitrust Enforcement*, 8(2), 354-405.
- Koukiadaki A., Katsaroumpas I. (2017) Temporary contracts, precarious employment, employees' fundamental rights and EU employment law, study for the PETI committee. [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596823/IPOL_STU\(2017\)596823_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596823/IPOL_STU(2017)596823_EN.pdf)
- Langille B. (1998) Labour law is not a commodity, *Industrial Law Journal*, 1011.
- TUAC (2019) Competition issues in labour markets, note for Item 4 of the 131st OECD Competition committee meeting on 5-7 June 2019.
- UNI Europa (2020) Accounting for workers' rights when regulating Amazon & other giants. https://www.politico.eu/wp-content/uploads/2020/09/Final_Uni-Global-UNI-Europa-DSA-Submission.pdf
- Vandaele K. (2018) Will trade unions survive in the platform economy? Emerging patterns of platform workers' collective voice and representation in Europe, Working Paper, 2018.05, Brussels, ETUI.

All links were checked on 5 July 2021.

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The ETUI Policy Brief series is edited jointly by Nicola Countouris, Jan Drahokoupil, Philippe Pochet, Aída Ponce Del Castillo, Kurt Vandaele and Sigurt Vitols.
The editor responsible for this issue is Philippe Pochet, ppochet@etui.org

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The ETUI is financially supported by the European Union. The European Union is not responsible for any use made of the information contained in this publication.